



April 7, 2000

Mr. Clay T. Grover
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OR2000-1369

Dear Mr. Grover:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134281.

The Fort Bend Independent School District (the "district") received a request for information received from various companies. You submitted, as responsive to the request, data services proposals the district received from three companies named in the request: Alltel, Phonoscope, and Time Warner Cable. You indicate that the submitted information contains proprietary commercial and financial information which might be excepted from disclosure under section 552.110 of the Government Code. You have notified the companies in question of the request pursuant to section 552.305 of the Government Code.

Section 552.110 excepts from disclosure trade secrets and certain other commercial or financial information. To date this office has received no arguments from Phonoscope or Time Warner Cable that the information at issue which was submitted to the district by these companies is subject to an exception to required disclosure. *See* Gov't Code § 552.305 (person notified by governmental body that request for information may implicate his proprietary interests has ten business days from date of receipt of notice to submit to attorney general reasons why the information should be withheld). Consequently, we have no basis for finding such information protected. The information at issue which was submitted to the district by Phonoscope or Time Warner Cable must be released.

Alltel has submitted arguments that portions of the information submitted by it to the district are protected from disclosure under section 552.110.¹ Section 552.110 excepts from required

¹Alltel also raises the sections 552.101 and 552.104 exception to disclosure. We understand Alltel's claim under section 552.101 -- which requires withholding information made confidential by law or by judicial decision -- to be the same as its section 552.110 claim, i.e. that the information constitutes protected trade secrets or commercial or financial information. Thus, we need not separately address Alltel's section 552.101

public disclosure

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision [and]

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information.

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;

claim. Section 552.104 -- which excepts information the release of which would give an advantage to a competitor or bidder -- protects only the interests of governmental bodies. *See* Open Records Decision No. 592 (1991). Since the district has not raised section 552.104, we do not address that exception.

- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). In our opinion, Alltel has not made a *prima facie* demonstration that any of the information at issue constitutes trade secrets.

However, it is our opinion that Alltel has shown that the release of certain information would cause it substantial competitive harm. Therefore, the highlighted information on the green-flagged pages may be withheld under section 552.110(b). Otherwise, the information submitted to the district by Alltel must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

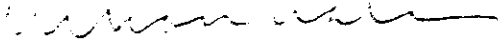
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ljp

Ref: ID# 134281

Encl. Submitted documents

cc: Mr. General Taylor, Jr.
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(w/o enclosures)